Supreme Court, U.S.
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No. 98-682

In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BOCA CIEGA'S BRIEF IN OPPOSITION TO BOUCHARD'S PETITION FOR A WRIT OF CERTIORARI

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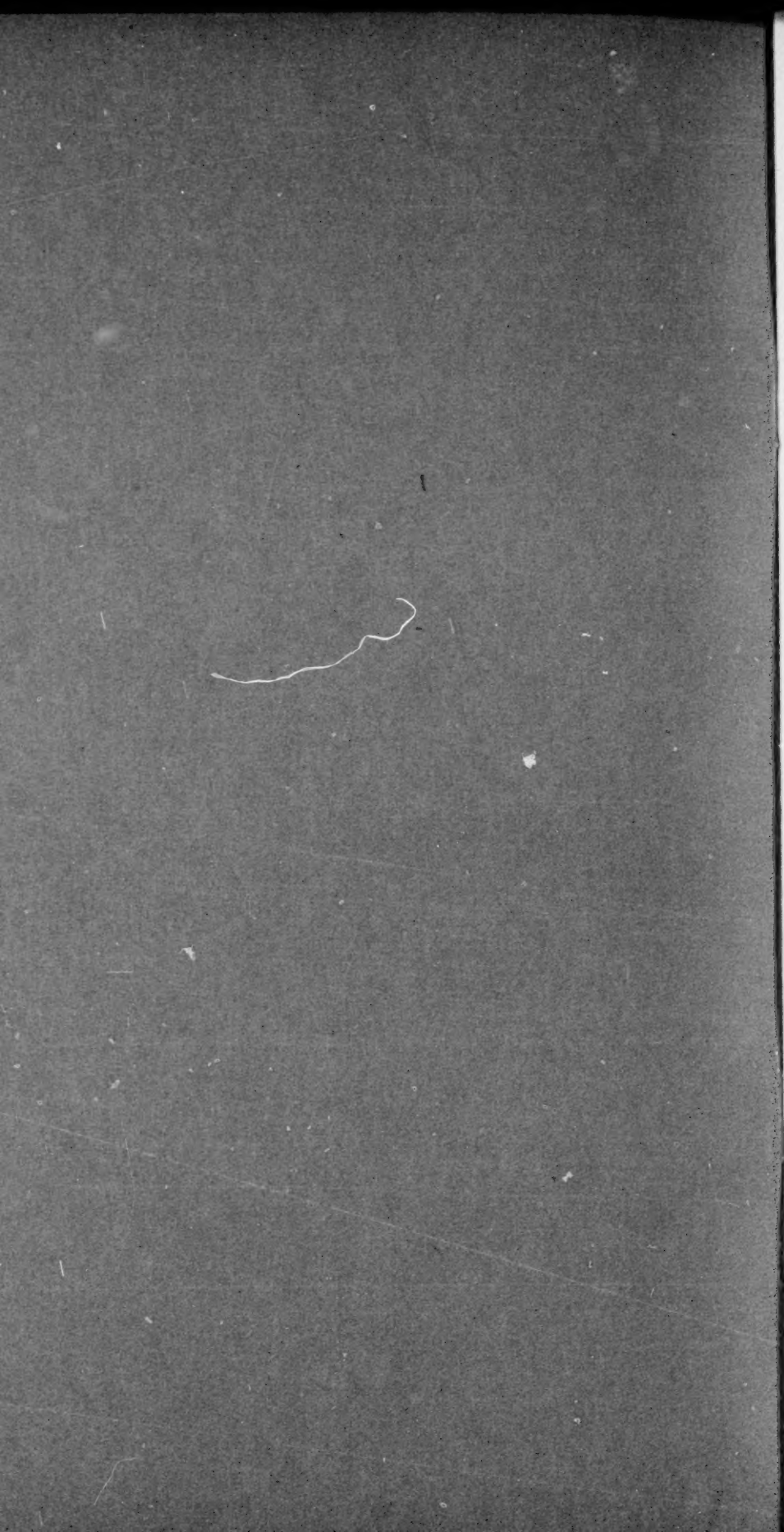

QUESTIONS PRESENTED

[*as framed by Petitioner*]

I. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

II. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in *Norwich v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

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SUPREME COURT RULE 29.6 STATEMENT

BOCA CIEGA HOTEL, INC. has no parent or subsidiary companies.

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STATEMENT OF THE CASE

On August 10, 1993, two tug-barge flotillas and a freighter were involved in a collision in the mouth of Tampa Bay. Thousands of gallons of petroleum and petroleum products were spilled into Florida's navigable waters. By evening of Sunday, August 15th, the discharged petroleum had made its way onto some sixteen miles of popular beaches or beach front property in Pinellas County. The oil spill resulted in substantial economic loss to business owners that relied on the attraction of the once pristine Pinellas County beaches for their patrons.

On September 16, 1993, claimants Boca Ciega Hotel, Inc., Barry and Brenda Jones, All Suite Motel, John Jones, Yiannis Koukoulis, Ahmad Shihadeh, Mary Beth Geiken and Don and Joan Tobin (the "Boca Ciega claimants") filed a lawsuit on behalf of themselves and all others similarly situated. Among other claims, the suit alleged violations of the Oil Pollution Act of 1990 [OPA 90], 33 U.S.C. Sec. 2701 et seq. The claimants are business owners and operators, employees of such businesses, or tourists, who have sustained economic damages from the oil spill. Their individual claims for damages range from $1,500.00 for an employee, up to $300,000.00 for a hotel owner claimant.

The vessel owners filed petitions for limitation of liability and contended that all claims had to be filed within the limitation proceeding. After prolonged litigation and several appeals, the lower courts determined that the plaintiffs should be free to pursue their claims

outside the limitation proceedings. The Boca Ciega plaintiffs have waited for five years to be compensated for their losses. These claimants respectfully request the Court to deny the vessel owners' Petition for a Writ of Certiorari so that their claims can be resolved on the merits.

REASONS FOR DENYING THE WRIT

1. There Is No Conflict Between The Circuit Courts Of Appeal Or With Any Relevant Decision Of This Court

None of the criteria that would justify review by a writ of certiorari are present here. There is no conflict in the circuit courts of appeal. In fact, the only two circuits to have addressed the issues raised by the vessel owners have reached the same conclusion: that Supplemental Rule F does not apply to actions commenced under OPA 90. See *Metlife Capital Corp. v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997), *cert. denied*, ___U.S.___, 118 S.Ct. 2367 (1998); *Bouchard Transportation Co. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998). Nor do the Petitioners cite any relevant decision of the Supreme Court which is in conflict with the decision of the Eleventh Circuit in this case.

2. The Questions Presented By The Petitioners Are Not Important Questions Requiring Resolution By The Supreme Court

This case does not raise any question that is of such pressing importance that it must be settled by the

Supreme Court. In enacting OPA, Congress comprehensively addressed the substantive rights of claimants and the procedures to be used for obtaining redress for damages caused by oil spills. The statute and the legislative history make crystal clear that OPA completely supersedes the Limitation Act of 1851. The vessel owners attempt to get around this incontrovertible fact by arguing that Supplemental Rule F to OPA, a rule of civil procedure, creates an independent right to concursus. As the Eleventh Circuit has held, this argument fails for two reasons: (1) OPA claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90. *Bouchard*, 147 F.3d at 1350. Application of Supplemental Rule F would thwart the legislative purpose and violate the Rules Enabling Act because it would modify substantive rights created by Congress.

The purpose of concursus which underlies the Limitation Act of 1851 is not, as the owners suggest, to avoid a multiplicity of lawsuits. Rather, concursus is granted only when necessary to distribute an inadequate fund among multiple claimants. OPA provides that those injured will be fully compensated by the responsible party or by the Oil Spill Liability Trust Fund ("the Fund") and further provides that the responsible party may obtain reimbursement from the Fund for amounts paid in excess of the statutory limits.

By creating the Fund and this mechanism, Congress eliminated the need for concursus as to oil pollution claims. See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law Sec. 18-2 at 385 (Practitioner Treatise Series, 2d ed. 1994) ("Since there is no concursus [under the OPA]

such as is available under the Limitation Act, transfer and consolidation of the various suits in a single forum will be up to the discretion of the court.") As the Eleventh Circuit points out, there is no allegation that the claims in this case pose any danger of exceeding the $1 billion cap on claims. *Bouchard,* 147 F.3d at 1350 n. 8.

Applying Supplemental Rule F to OPA would also violate the Rules Enabling Act, 28 U.S.C. Sec. 2072. Congress plainly did not intend claimants under OPA to be subjected to the Limitation Act or pro rata distribution of available funds. The Senate Report characterized the Limitation Act as a "potentially devastating bar" to effective recovery of either cleanup costs or damages. Senate Report on P.L. 101-380, S. Rep. No. 94, 101st Cong. 2d sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 722, 725.

As a rule of civil procedure, Supplemental Rule F cannot be applied in any way that would impair or abridge substantive rights created by Congress. *Douglas v. NCNB Texas National Bank,* 979 F.2d 1128, 1130 (5th Cir.), *cert. denied, Douglas v. FDIC,* sub nom. 510 U.S. 817, (1993). Instead of providing claimants with full recovery for damages sustained by them as the result of an oil spill, the Supplemental Rule F procedure would subject them to concursus, under which their recovery would be diminished. If the vessel owners' argument were to be accepted, it would abridge substantive rights created by Congress "in the guise of regulating procedure." *Sibbach v. Wilson & Co.,* 312 U.S. 1, 10 (1941).

Application of Supplemental Rule F would conflict with OPA in other ways as well. Under OPA, the state and federal courts have concurrent jurisdiction over OPA

claims. Because Supplemental Rule F is a rule of federal civil procedure, either it would vitiate the concurrent jurisdiction of the state courts or it would have no application to cases brought in state court. In addition, application of Supplemental Rule F would drastically reduce the generous limitations period provided by OPA for bringing claims against the responsible party and would restrict the venue provisions of OPA. *Bouchard*, 147 F.3d at 1350-51.

The Eleventh Circuit properly concluded that "Rule F is designed to distribute a limited fund to multiple claimants where Congress has provided no statutory procedure for that distribution and where all claims cannot be paid in full. This case satisfies neither of these requirements – Congress has provided a procedure for implementing OPA and the Fund will guarantee full payment of all valid OPA 90 claims arising from this oil discharge." *Bouchard*, 147 F.3d at 1352. The Petitioners have advanced no cogent reason why the Supreme Court review of this ruling is necessary.

3. This Court Should Not Create A Rule To Fix A Non-Existent Problem

Petitioners ask this Court to exercise its legislative powers to create procedural rules for the implementation of OPA 90. In support of this farfetched argument, Petitioners allude to the fact that 127 years ago, the Supreme Court created the precursor of Supplemental Rule F in order to fill a procedural vacuum needed to implement the Limitation of Liability Act. The Court should decline the Petitioners' invitation because, as the Eleventh Circuit held, Congress has specifically set forth procedures to implement OPA.

Petitioners argue that this Court has broad authority in admiralty and maritime matters under Article III, Sec. 2 of the United States Constitution. However, there is no reason for this Court to engage in rulemaking where Congress has enacted comprehensive legislation on the subject and when the issues raised by the vessel owners appear to be of purely hypothetical concern. While the Petitioners articulate numerous reasons why concursus would be desirable in OPA cases, these arguments are properly addressed to Congress and not to the judicial branch.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: November 24, 1998

Respectfully submitted,

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